IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 147 of 2005
With
CIVIL APPLICATION No. 6853 of 2005
In
SECOND APPEAL No. 147 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHAGWATIBEN WD/O RAVJIBHAI LALJIBHAI HALPATI - Appellant(s)
Versus
SHANTABEN MAGANLAL NAIK & 2 - Defendant(s)

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Appearance :
MR SP MAJMUDAR for Appellant(s) : 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.5, 1.3.1,1.3.2
MR DAKSHESH MEHTA for Defendant(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 11/12/2006

ORAL JUDGMENT

1. Shri S.P. Majmudar, learned counsel for the appellants. Mr. Dakshesh Mehta, learned counsel for the respondents.
2. Present is an appeal by successors/legal representatives of Laljibhai Rupjibhai Halpati, who had died during pendency of the Regular Civil Appeal.
3. Plaintiff-Shantaben Maganlal Naik and her sons namely Jayantilal and Harshadkumar had filed Regular Civil Suit No. 42 of 1992 against Laljibhai Rupjibhai Halpati, submitting inter alia, that the defendant be declared to have no right in the property, he was a licensee, he was not entitled to make any construction or change in the existing hutment and that he be directed to restore back possession of the property in favour of the plaintiffs. It was submitted by the plaintiff that she is a farmer and owner of the suit property bearing block no. 236 of Mouje Ajarai, Taluka-Gandevi. On the said land, a hutment admeasuring 25x35 feet bearing house no. 338 situate, the defendant was holding a house which had drowned in 1968 floods and

thereafter, the plaintiff, by showing mercy and grace, allowed the defendant to occupy the house which was constructed by her. It was submitted that the defendant was a licensee, he was not paying any rent and was also not entitled to any relief.

4. The defendant appeared in the court and inter alia submitted that he is a tenant in the property, in view of Sections 16 read with Sections 85 and 85A of the Bombay Tenancy & Agricultural Lands Act, 1948, he cannot be evicted and as the Civil Court has no jurisdiction, the suit be dismissed. It was submitted by him that he being a tenant, no order of his eviction can be made by the Civil Court.

5. Learned trial court framed as many as six issues, out of which Issue No.4A was that “whether the defendant proves that he is a tenant in the suit land/property?”

6. At no point of time, the defendant submitted to the Civil Court that the issue relating to Sections 85, 85A or Section 16 of the 1948 Act

be framed, same be treated as preliminary issue and parties be heard on the said issue, or in view of the defence raised by the defendant the matter be referred to the Mamlatdar for his decision and the proceedings be stayed till final disposal of the matter by the Mamlatdar or the revenue authority. The trial court proceeded with the trial and the parties led evidence. After hearing the parties, vide its judgment dated 26.2.98 passed in Regular Civil Suit No. 42 of 1992, the learned Joint Civil Judge [Junior Division] at Gandevi, after holding in favour of the plaintiffs decreed the suit. The trial court held that the defendant has failed to prove that he is a tenant in the property. It also held that the plaintiffs were successful in proving that by showing grace and mercy, the plaintiff had allowed the defendant to occupy the hutment which was in existence in the year 1968. It also held in favour of the plaintiffs that the defendant was a licensee in the premises and had no right in the property in dispute.

7. The defendant-Laljibhai Rupjibhai Halpati [since deceased] filed Regular Civil Appeal No. 80 of 1998, which came to be dismissed by the Extra Assistant Judge, Navsari vide his judgment dated 1.4.05. The appellate court held that in view of the admissions made by the defendant that he was allowed to occupy house somewhere in the year 1968, the defendant agreed with the plaintiff that on allotment of other house, he would vacate the premises and he never cultivated any parcel of land belonging to the plaintiff, the defendant was not entitled to any protection under the revenue laws, it accordingly dismissed the appeal. The present Second Appeal is at the instance of the successors/legal representatives of Laljibhai Rupjibhai [since deceased]. The appeal has been admitted for hearing on 25.9.06 on the following substantial question of law:-

> "Whether on the facts and in the circumstances of the case, the courts below were not justified in holding that they had jurisdiction to decide the matter of the

present nature?”

8. Shri S.P. Majmudar, learned counsel for the appellants placing reliance upon Sections 16,70 and Section 85 and Section 85A of 1948 Act submitted that the moment issue of jurisdiction is raised or the moment question of tenancy is raised, the Civil Court must stay its hand and refer the matter to the Mamlatdar for his decision on the question of tenancy and rights of the parties. Placing reliance upon the judgment of the Apex Court in the matter of Parmar Kanaksinh Bhagwansinh [dead] by Lrs. v. Makwana Shanabhai Bhikhabhai & Anr. [1995 [2] GLR 1409], it is submitted that combined effect of Sections 70, 85 and 85A is that the Civil Court is under a duty to refer the issue regarding alleged tenancy to the Mamlatdar and stay the suit till the issue is decided. His submission is that if it is a duty cast upon the court, then the parties are not required to remind the court.

9. On the other hand, Mr. Dakshesh Mehta, learned

counsel for the respondents-plaintiffs submits that combined effect of Sections 16, 70, 85 and 85A may be that the matter may have to be referred to the revenue court, but in a case where evidence on the record clearly suggests that the defendant is not a tenant, then at the time of the final judgment the court can always rely upon the evidence and may decide the matter on the strength of the evidence. His submission is that if the admissions of the defendant are that in the year 1968, hutment-cum-house was already in existence and that the defendant never cultivated the plaintiffs' land, then in view of the said admissions it must be held that the defendant is not a tenant.

10. He places his reliance upon the judgments of the Bombay High Court in the case of M/s. Nilesh Construction Company and another v. Mrs. Gangubai and others [AIR 1982 Bombay 491], Laxmibai Kisanrao Tamhane and others v. Smt. Trivenibai [AIR 1973 Bombay 152] and Hargovan Keshav v. Mansing Thakorbhai & Ors. [2000 [3] GLR 2063 and contends that if the defendant

raises inconsistent pleas, then on such vague pleadings, Civil Court is not required to refer the matter to the revenue court. His further submission is that once the evidence is brought on the record that the defendant was not a tenant and had not constructed the house, as required under Section 16 of the Act, Civil Court certainly could order eviction of the defendant.

11. In the matter of Kanaksinh Bhagwansinh Parmar [supra], the Supreme Court has observed that combined effect of juxtapose reading of Sections 70, 85 and 85A of 1948 Act wold be that the Civil Court should wait for the judgment of the revenue court which will be on the issue of the right of the defendant as tenant. However, the said judgment would not apply to the present matter, because, neither the Civil Court referred the matter to the revenue authority nor parties reminded the Civil Court that the matter was required to be referred to the revenue court. I could understand a case where non-observance of statutory duty cast upon the

Civil Court had led to illegal judgment, but present is a case where the defendant did not require the court to refer the issue to the revenue court, but the defendant entered in the witness box to support his defence. His pleadings were that he is owner as he has constructed the house and is tenant as he was cultivating the land. While in the witness box, unfortunately, truth started coming out of its depth, he made clear admissions that he had suffered floods, his house was washed away and in the year 1968, the plaintiff showing grace and mercy allowed him to stay in the house in existence in 1968. This statement would make it clear that the house was already in existence and nothing was created or constructed by the defendant. Section 16 of 1948 Act reads as under:-

> "16. Bar to eviction from dwelling house.--
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> [1] if in any village, a tenant is in occupation of a dwelling house built at the expense of such tenant or his predecessor

in-title on a site belonging to his landlord, such tenant shall not be evicted from such dwelling house [with the materials and the site thereof and the land immediately appurtenant thereto and necessary for its enjoyment] unless--

[a] the landlord proves that the dwelling house was not built at the expense of such tenant or his predecessor-in-title: and

[b] such tenant makes any three defaults in the payment of rent, if any, which he has paying for the use and occupation of such site.

[2] The provisions of sub-section [1] shall not apply to a dwelling house which is situated on any land used for the purposes of agriculture from which he has been been evicted under section 31."

11. From a perusal of Section 70, it would clearly appear that a tenant cannot be evicted from a dwelling house which was built by the defendant/tenant at his own expenses or by his predecessor-in-title. In the present case, the moment defendant accepted that he was allowed to stay in a house, application of Section 16 would become impossible. We do not know what would have been the judgment of the revenue court in

case if issue was referred by the Civil Court to the revenue court. But unfortunately, admissions made by the defendant would now fix him. He had categorically admitted that he did not spend anything for constructing house, the government had already allotted him house no. 411, he had assured the plaintiffs that after the house is allotted to him he will vacate the premises and the last nail fixed in his own coffin was his own admission that he never cultivated any land belonging to the plaintiffs. If the defendant never cultivated any land belonging to the plaintiffs, then by no stretch of imagination he can be held to be a tenant and as he has not constructed any house of his own by spending his own money or any of his predecessor-in-title, did not construct any house by spending from their own pocket, then Section 16 would also have no application.

12. Present is a case where the defendant has missed opportunity of raising an issue at right time and unfortunately, started making admissions in favour o the plaintiffs.

13. In the matter of M/s. Nilesh Construction Company and another [supra], Bombay High Court has further observed that if the question is whether provisions of the Tenancy Act are attracted to a given case on facts, which are not in dispute, it is clearly permissible for the Civil Court to go into the question of the applicability of the provisions of the Tenancy Act. In the matter of Hargovan Keshav [supra], the learned Single Judge of this Court has held that a party cannot be permitted to raise inconsistent stand claiming ownership as well as tenancy over the same land. The Court also observed that in the absence of any material to justify reference to the revenue authority, such reference could not be made and the High Court would not interfere into the judgment of the learned court below.

14. I repeatedly asked Mr. S.P. Majmudar, learned counsel for the appellants as to how the appellant explains admissions made by him, Shri Majmudar simply submitted that as the issue was raised, the trial court was obliged to refer the

issue to the Civil Court.

15. I had asked Shri Majmudar that even if the issue of jurisdiction was raised and was not decided as a preliminary issue and in the meanwhile, admissions of the defendant started floating on the surface of the record, was the court not required to decide the issue about right and title of the parties, Shri Majmudar submitted that in view of the judgment of the Supreme Court and provisions of law, the matter ought to have been referred to the Mamlatdar.

16. In the opinion of this Court, in view of the admissions made by the defendant-appellant when the two courts have held that Section 16 of 1948 Act does not apply, because the defendant has not constructed the property from his own funds and that he was not tenant in view of his admission that he never cultivated the plaintiff's land, the courts below cannot be held to to err.

17. In the opinion of this Court, the courts below were not unjustified in holding that they had jurisdiction to decide the matter of the present

nature, specially in view of the pleadings of the parties and the admissions made by the defendant.

18. The appeal deserves to and is accordingly dismissed. Consequently, Civil Application No. 6853 of 2005 is also rejected. Interim relief is vacated. No costs.

19. Let a decree be framed accordingly.

[R.S. GARG, J.]

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